No. 15023

Jnited States Court of Appeals

For the Ninth Circuit

EROCEAN STEAMSHIP COMPANY, INC., a corporation, and BLACKCHESTER LINES, INC., a corporation,
Appellants,

vs.

BERT W. COPP, JR., as Executor under the Last Will Testament of Albert W. Copp, deceased, *Appellee.*

PEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON NORTHERN DIVISION

BRIEF OF APPELLANTS

SUMMERS, BUCEY & HOWARD
G. H. BUCEY
THEODORE A. LEGROS
Proctors for Appellants.

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United States Court of Appeals
For the Ninth Circuit

AMEROCEAN STEAMSHIP COMPANY, INC., a corporation, and BLACKCHESTER LINES, INC., a corporation, *Appellants,* vs. ALBERT W. COPP, JR., as Executor under the Last Will and Testament of Albert W. Copp, deceased, *Appellee.*	}	No. 15023

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON NORTHERN DIVISION

BRIEF OF APPELLANTS

STATEMENT OF JURISDICTION

This action was commenced by libel *in rem* in admiralty (Tr. 3) filed in the District Court at Seattle against the Steamship AMEROCEAN seeking recovery of damages for injuries allegedly suffered by libelant, an employee of an independent contractor, while working aboard said vessel. Appellants filed their claim of ownership (Tr. 10) and answer to the libel (Tr. 27) and were granted leave under Supreme Court Admiralty Rule 56 to implead libelant's employer, Albert W. Copp, d/b/a Northwest Ship Repair Co., as third party respondent on a claim for full indemnity in case of recovery by libelant (Tr. 16). The third party respondent subsequently filed his answer to the impleading petition (Tr. 38). The principal action having been settled

and order of dismissal entered, the case proceeded to trial on appellants' claim for full indemnity against Albert W. Copp, Jr., who as executor of his father's estate was substituted as third party respondent upon oral stipulation of counsel approved by the court (Tr. 102, 103).

The district court had jurisdiction of the action pursuant to 28 U.S.C.A. Sec. 1333 which vests jurisdiction of all admiralty causes in the United States District Courts.

The jurisdiction of this court is based upon 28 U.S.C.A. Sec. 1291 which vests jurisdiction of all appeals from final decisions of the district courts in the Court of Appeals.

STATEMENT OF THE CASE

Edward J. O'Neill, as chief mate aboard the steamship AMEROCEAN on her voyage from the Far East to Seattle in August of 1954, in addition to other duties was in charge of the maintenance of the vessel, its decks and cargo gear (Tr. 90). On or about August 3, 1954, while the vessel was about four days out of Pusan, the mate caused the men under his command to oil the port side of the main deck from the extreme bow to the after end of the No. 3 hatch with a mixture of fish oil, lamp black and Japan dryer (Tr. 91, 92). This mixture acts as a rust preventative (Tr. 88). Because of the foggy, rainy weather which was subsequently encountered the oiled surface was slow in drying in spite of the extra dryer which was used, and the mate refrained from oiling the starboard side in order to keep one portion of the deck open for use (Tr. 92, 93). The oiled portion

had a black appearance while the rest of the forward deck was red and rusty (Tr. 94). About two days out of Seattle the mate ordered the ship's personnel to raise the booms, spread the guys and prepare for port. In doing so they used the oiled portion of the deck without difficulty (Tr. 92).

On August 16, 1954, her cargo having been discharged and her voyage completed, the AMEROCEAN was docked starboard side to the VanVetter's Dock in Seattle, Washington. Albert W. Copp, an independent contractor, doing business under the assumed name of Northwest Ship Repair Co., had been engaged to dismantle grain fittings, remove charterer's property and refurbish the ship so that it could be returned to the owner in the same condition as when originally chartered (Tr. 98). At some time between 8:30 and 9:00 o'clock in the morning the employees of the repair company under Superintendent Barney Trout came aboard and commenced their operations (Tr. 70, 71, 96). Walter Houlton, as rigger foreman, gave the necessary work orders and was responsible for eight men under his supervision, including the libelant Avon Smith (Tr. 69, 70, 71). Claude Raymond Romo was the boilermaker foreman under the employ of the repair company, and his duties complemented those of Walter Houlton (Tr. 85).

There was no evidence tending to show that any of the ship's officers or crew were doing any work upon those portions of the ship where the contractor's work was being performed on the day in question, or that the contractor's employees did not have sole and complete charge thereof, including the forward deck, hatches,

winches, booms and other gear. To the contrary, the evidence indicated that the ship's officers and crew had finished all their work and were being paid off in the ship's saloon, as the shipping commissioner had come aboard the AMEROCEAN for that purpose in the forenoon (Tr. 74, 97).

At approximately 11:30 on the morning of August 16, 1954, a scow arrived alongside the AMEROCEAN and made fast to the port side near the No. 1 hatch in order to aid in the removal of debris from the ship (Tr. 71). Houlton and Romo both testified that during the time that the scow was being made fast to the AMEROCEAN they went onto the port side of the main deck near the No. 1 hatch to help tie up the scow and noticed that the deck was slippery (Tr. 71, 85, 86). Houlton testified that while assisting in tying up the scow he slipped on the deck and slightly injured his wrist (Tr. 72, 75). Although Houlton knew that sawdust was available and could easily have been applied to the deck to remedy the slippery condition, and had discussed it with Romo, no request for sawdust was made to the chief mate nor did Houlton or Romo do anything to remedy the situation prior to the injury in question (Tr. 75, 78, 86, 88, 96).

The libelant, Avon Smith, first reported for work aboard the AMEROCEAN at about 1:15 in the afternoon of August 16, 1954. He reported directly to his foreman, Walter Houlton, who instructed him to go onto the port side of the main deck and shift the boom out on the port side (Tr. 64, 65). In spite of their knowledge of the slippery deck neither Houlton nor Romo gave Smith any warning although both of them were within

thirty feet of him when he stepped from the No. 1 hatch onto the deck, slipped and suffered a fractured hip (Tr. 65, 66, 73, 76, 88). The first notice that any of the ship's personnel had of the accident was when Houlton went to the saloon where the mate was assisting in paying off the crew, and reported to the mate that a man had just broken his leg and had been removed from the vessel (Tr. 95, 98).

The trial court held that the negligence of the ship in creating the slippery condition and permitting it to continue and the negligence of the repair company in instructing its employees to continue work after having knowledge of the dangerous condition, were concurrent and active acts of negligence and denied the claim for full indemnity. The claimants, believing that the sole, active negligence was that of the contractor and its employees, have taken this appeal.

SPECIFICATIONS OF ERROR

1. The court erred in making that portion of Finding of Fact No. VII wherein the word "also" was used before the phrase "actively negligent" thereby implying that in addition to the unseaworthiness of the AMEROCEAN, as found in the preceding finding, the appellants were guilty of negligence and that it was active negligence.

2. The court erred in failing to find that any negligence chargeable to the appellants and the steamship AMEROCEAN was merely passive negligence as was set forth in appellants' proposed Finding of Fact No. VIII.

3. The court erred in failing to find that the active negligence of the appellee was the sole proximate cause of libelant's injury as was set forth in appellants' proposed Finding of Fact No. IX.

4. The court erred in making Conclusion of Law No. I in so far as it stated that the appellants were guilty of negligence which was active, continuous and concurrent with the negligence of the appellee and that said parties were joint tort-feasors.

5. The court erred in making Conclusion of Law No. III and in entering its final decree dismissing appellants' impleading petition with prejudice.

SUMMARY OF ARGUMENT

Since specifications of error Nos. 1, 2, 3, 4 and 5 involve the same legal principles and are based on the same facts they will be discussed together for the sake of convenience. Only one question is raised, to-wit: Did the trial court err in holding that appellants and appellee were joint tort-feasors in that each was guilty of acts of negligence which were active, continuous and concurrent and which proximately caused libelant's injuries; thereby rejecting appellants' contention that the sole, active negligence proximately contributing to Smith's injuries was that of the appellee?

ARGUMENT

I.

Appellants Are Entitled to Recover Full Indemnity from Appellee

It is well-settled law that appellants owed to Smith a non-delegable duty to supply a seaworthy ship and appurtenant appliances. Liability for breach of this duty is absolute and is not based on any concept of negligence. *Mahnich v. Southern Steamship Co.,* 321 U.S. 96, 88 L.Ed. 561, 64 S.Ct. 455 (1944); *Seas Shipping Co. v. Sieracki,* 328 U.S. 85, 90 L.Ed. 1009, 66 S.Ct. 872 (1946); *Pope & Talbot v. Hawn,* 346 U.S. 406, 98 L.Ed. 143, 74 S.Ct. 202 (1943).

In light of the foregoing legal principles appellants conceded that the port side of the main deck of the steamship AMEROCEAN was in an unseaworthy condition and that the vessel's non-delegable duty to provide Smith with a safe place to work had been breached and therefore settled his claim for a sum which appellee stipulated was reasonable (Findings of Fact Nos. IV and VI; Tr. 48).

That appellants' right to recover full indemnity from appellee, as libelant's employer, is not barred by the Longshoremen's and Harbor Workers' Compensation Act has been conclusively settled by a United States Supreme Court decision rendered subsequent to the instant case. In *Ryan Stevedoring Company v. Pan-Atlantic Steamship Company,* ..... U.S. ....., 100 L.Ed. (Advance) 146, 1956 A.M.C. 9, the court affirmed a judgment of the Court of Appeals for the Second Circuit granting full indemnity to the steamship company even

in the absence of an express contract of indemnity, holding that a stevedore contractor who agrees to perform the shipowners' stevedoring operations, thereby assumes the obligation to do its work properly and safely. This obligation is of the essence of the stevedore's contract and is a warranty of workmanlike service comparable to a manufacturer's warranty of the soundness of its manufactured product. For breach of this obligation the Supreme Court allowed recovery on an indemnity theory.

Cases decided by the Court of Appeals for the Ninth Circuit have likewise established that while a shipowner may be held liable in damages to an employee of an independent contractor for injuries sustained because of the unseaworthiness of the vessel, defect in equipment or failure to supply a safe place in which to work, the shipowner is entitled to full indemnity from the contractor for the amount of such damages, if the contractor, *with knowledge of such unseaworthiness, defect, or failure to supply a safe place to work,* permits its employee to work there without taking proper steps to remedy such unsafe condition. *United States v. Arrow Stevedoring Co.,* 175 F.(2d) 329, 1949 A.M.C. 1445 (C.A. 9th, 1949); *United States v. Rothschild International Stevedoring Co.,* 183 F.(2d) 181, 1950 A.M.C. 1332 (C.A. 9th, 1950); *States Steamship Co. v. Rothschild International Stevedoring Co.,* 205 F.(2d) 253, 1953 A.M.C. 1399 (C.A. 9th, 1953).

In the *Arrow Stevedoring* case, *supra,* one Williams, an employee of Arrow Stevedoring Co. was injured on a vessel owned by the United States by the falling of a heavy steel hatch cover which was insecurely held in

lace by *defective dogs.* He sued the shipowner for amages, and the latter impleaded the stevedore company seeking indemnity. The district court denied such ight of indemnity and on appeal this court reversed, olding that indemnity should be granted, for the reaon that the contractor's negligence in permitting Williams to work near this hatch cover, *when his supervisor had full knowledge of the danger and failed to ake any steps to remedy the danger* was the sole proximate cause of the injury, saying:

"It is thus apparent that Arrow's supervisor knew that the ship would do nothing about the cover of port hatch No. 4 until 'sometime' during the day shift. Assuming that this transferred to the ship, to perform sometime in the morning shift, the obligation of Arrow's contract, later considered, to raise this hatch door, *Arrow clearly owed the duty to see that none of its stevedores should work under it until the danger known to exist was removed.*

* * * * * * * *

"The testimony is uncontradicted that in this defective condition of the dogs of the port hatch the cover could have been securely held erect by a clamp and turnbuckle attached to both starboard and port hatch doors. Such turnbuckle and gear was right there by the hatch for that purpose.

* * * * * * * *

"On the facts we find that *the sole proximate cause of the injury to Williams was the negligence of Arrow in its use of the door with knowledge of its defects of dogs and pins. The Government in no way participated* in the wrongful use of the door, which otherwise could have been made secure in the usual manner described by Arrow's Larsen."

United States v. Arrow Stevedoring Co., 175 F.(2d) 329, 331, 1949 A.M.C. 1445 (C.A. 9th, 1949) (Emphasis added)

In *United States v. Rothschild International Stevedoring Co.,* 183 F.(2d) 181, 1950 A.M.C. 1332 (C.A. 9th, 1950) one Dillon, an employee of a contracting stevedore (Rothschild) was injured by reason of a defective brake of a winch on a vessel owned by the United States. He recovered judgment against the shipowner but the district court dismissed the shipowner's action for indemnity. On appeal this court reviewed the evidence, which showed that the stevedore's hatchtender knew that the winch brake was defective, and had reported it to an officer of the vessel but when nothing was done to correct the defective condition the stevedore had proceeded to use the winch anyway, and held the shipowner was entitled to full indemnity, saying:

> "It is clear that both the United States and Rothschild were negligent. It seems equally clear that Rothschild had warning of the defect which was the immediate cause of the accident. *With this knowledge Rothschild should not have permitted Dillon to work in this dangerous circumstance as to which it was fully informed.* The facts present the case fully within language used in the well-known case of *The Mars,* D.C.S.D.N.Y. 1914, 9 F. (2d) 183, 184: 'It may be thought that this was a proper case for dividing damages. I think not. * * * I take it that the distinction there is this: Where two joint wrongdoers contribute simultaneously to an injury, then they share the damages; *but where one of the wrongdoers completes his wrong, and the subsequent damages are due to an independent act*

of negligence, which supervenes in time, and which has as its basis a condition which has resulted from this first act of negligence, in that case they do not share; but in that case we say that the consequences of the first act of negligence did not include the consequences of the second.' "

United States v. Rothschild International Stevedoring Co., 183 F.(2d) 181, 182, 1950 A.M.C. 1332 (C.A. 9th, 1950) (Emphasis added)

In *States Steamship Co. v. Rothschild International Stevedoring Co.,* 205 F.(2d) 253, 1953 A.M.C. 1399 (C.A. 9th, 1953), one of Rothschild's employees had died from an injury received while working aboard a vessel owned by States Steamship Company as a result of the alleged defective condition of a winch handle. Suit for his death was brought against the shipowner and settlement was made because of its non-delegable duty to provide a safe place to work. The shipowner's action for full indemnity against the contractor was dismissed by the district court, but on appeal this court reversed the decree, stating in part:

"The absolute duty of a shipowner to provide a safe place for longshoremen to work may be likened to the absolute duty of a landowner to keep his premises in such condition that passers-by are not injured. When this duty is violated, the owner is liable to anyone injured whether he is at fault or not. See Prosser on Torts, pp. 602-605, and cases cited. Where the breach of this duty is caused by the acts of some third person, in which acts the owner is not a party, the owner may demand indemnity from the wrongdoer.

* * * * * * * *

"Here, the shipowner and operator gave permission to a stevedore company to be named by the charterer of the vessel's cargo space to go on the owner's premises to earn his charterer's profits. *A person so permitted to occupy the owner's ship's premises owes to the owner the duty to refrain from negligent acts which foreseeably would impose a liability on the owner and has an obligation to the owner not in pari delicto in such negligence to indemnify him for the amount he is required to pay because of such acts.*"

States Steamship Co. v. Rothschild International Stevedoring Co., 205 F.(2d) 253, 255, 256, 1953 A.M.C. 1399 (C.A. 9th, 1953) (Emphasis added)

For other authorities holding that even the negligence of a shipowner will not bar his right to recover full indemnity where such negligence is found to be merely passive or secondary see: *Barber Steamship Lines v. Quinn Bros., Inc.,* 94 F.Supp. 212 (D.C.D. Mass., 1950); *McFall v. Compagnie Maritime Belge,* 304 N.Y. 314, 107 N.E.(2d) 463 (C.A. of N.Y., 1952); *Davis v. American President Lines,* 106 F.Supp. 729, 1952 A.M.C. 818 (D.C.N.D. Calif., 1952); *Raskin v. Victory Carriers, Inc.,* 124 F.Supp. 879, 1954 A.M.C. 1899 (D.C.E.D. Penn., 1953); *Berti v. Compagnie De Navigation Cyprien Fabre,* 213 F.(2d) 397, 1954 A.M.C. 1111 (C.A. 2nd, 1954); "The Employer's Duty to Indemnify Shipowners for Damages Recovered by Harbor Workers," 103 U. of Pa. L. Rev. 321 (1954).

In the *Barber Steamship* case, *supra,* the court said:

"First of all, it does not follow from the fact that plaintiff here was liable to Onorato, the injured

stevedore, that plaintiff was itself guilty of any fault. Such liability may have been grounded not on any negligence of plaintiff, but on its absolute duty to furnish the stevedore with a seaworthy vessel on which to work. *Seas Shipping Co., Inc., v. Sieracki, supra. Moreover, negligence on the part of the plaintiff, making it a tort-feasor, would not defeat recovery of indemnity in every case.* Although indemnity is barred where the parties are joint tort-feasors in *pari-delicto,* it may be recovered when the tort-feasor seeking indemnity is not in *pari-delicto, e.g.,* where its negligence can be considered secondary or merely passive, rather than primary and active." (Citing cases)

> *Barber Steamship Lines v. Quinn Bros., Inc.,* 94 F.Supp. 212, 213 (D.C.D. Mass., 1950) (Emphasis added)

In the case of *Davis v. American President Lines, supra,* the District Court for the Northern District of California stated the rule as follows:

> "Both the common law and admiralty courts have recognized a right to indemnity, as distinguished from contribution, in a person who has responded in damages for a loss caused by a wrong of another. This right has been recognized in *two general classes of cases: those in which the person seeking indemnification was without fault; and those in which such person was passively negligent, but the primary cause was the active negligence of another."*

> *Davis v. American President Lines,* 106 F. Supp. 729, 730, 1952 A.M.C. 818 (D.C.N.D. Calif., 1952)

The court in *Raskin v. Victory Carriers, Inc.,* 124 F.

Supp. 879, 1954 A.M.C. 1899 (D.C.E.D. Penn., 1953) held that even though a dangerous condition aboard ship had been created by the negligence of the shipowner, it was *active negligence* for a contractor to permit its employees to work on the ship, *knowing of the dangerous condition, and relying on the chance that nothing would happen* and upheld a jury verdict granting full indemnity to the shipowner.

In *Berti v. Compagnie, Etc.,* 213 F.(2d) 397, 1954 A.M.C. 1111 (C.A. 2nd, 1954), a longshoreman sued the shipowner for personal injuries alleging unseaworthiness in that the locking device on a hatch beam was defective. The shipowner impleaded his employer seeking indemnity. On appeal the court reversed an order of dismissal entered in the indemnity action. In commenting on the employer's (American) actions the court stated in part:

> " . . . *it was fully aware of the condition of the ship's equipment and failed to take proper precautions.* Hence on this showing American's fault was primary; and on the record now before us Cyprien was legally entitled to indemnity for any judgment which plaintiff might ultimately recover."
>
> *Berti v. Compagnie De Navigation Cyprien Fabre,* 213 F.(2d) 397, 401 1954 A.M.C. 1111 (C.A. 2nd, 1954)

The evidence in the instant case established, and the trial court found, that appellee was actively negligent in instructing libelant to proceed to work on the port side of the AMEROCEAN without warning him of the slip-

pery portion of the deck, of which it had knowledge, nd in failing to do anything to remedy this dangerous ondition. Houlton and Romo, appellee's foremen, both new of this slippery and unsafe condition at approxiately 11:30 in the morning but did not report it to ny of the ship's officers nor make use of available sawust to prevent further slipping nor order the men nder them to cease work on the slippery portion of the eck. Instead they allowed the men to continue working n the chance that nothing would happen and did not ven warn Smith of the danger of which they had notice or over an hour and a half. Soon after Smith came board Houlton ordered him to swing out the boom on he port side.

On the basis of these facts the trial court correctly ound and concluded that the appellee was actively egligent. However, appellants vigorously contend that n so far as the court impliedly found appellants were lso negligent, and that such negligence was active, its inding was clearly erroneous. The appellants' fault in ailing to provide a seaworthy ship and a safe place to vork terminated when appellee's foremen discovered he unsafe condition. Appellants' fault was merely pasive and the sole proximate cause of the libelant's inuries was appellee's supervening, active negligence in nstructing the libelant to work on the port side of the eck without warning him of the known danger. The rial court therefore erred in dismissing the indemnity ction.

CONCLUSION

Appellants respectfully submit that the decree of the trial court should be reversed with instructions to ente a decree granting full indemnity to the appellants together with their costs of suit.

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